In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-837

ALEXANDER ERVIN WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the trial judge erred when he restricted petitioner's cross-examination of a government witness relating to that witness's possible expectation of immunity from a state prosecution, and (2) that the trial judge erred when he failed to give a special instruction to the jury regarding accomplice testimony.

Following a jury trial in the United States District Court for the District of North Carolina, petitioner was convicted of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to twelve years' imprisonment to be followed by a three-year special parole term. The court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. B).

Approximately one month before petitioner's trial, his co-defendant, Howard Ray Reeder, entered a plea of guilty to the indictment in this case. He then testified for the government at the trial of petitioner. Reeder related that in September 1973 he was introduced to petitioner, who asked him if he had a contact from whom he could purchase heroin (Tr. 12-14). Reeder responded affirmatively and, after checking with his New York source, informed petitioner that the heroin would cost $1,200 an ounce (Tr. 14). The following day, petitioner and Reeder flew to New York, where they purchased $1,200 worth of heroin from Reeder's contact (Tr. 15-17). Petitioner gave Reeder $50 to $100 for his assistance and the expenses of the trip (Tr. 16).

On September 24, 1973, petitioner again requested Reeder to accompany him to New York in order to make a purchase of two ounces of heroin (Tr. 17-18). The following day, they flew to New York where they were again met by Reeder's contact and taken to a bar (Tr. 20). When the contact informed them that the heroin would cost $2,600, petitioner and Reeder went into the bathroom of the bar, and petitioner gave Reeder $2,600 with which to make the purchase (Tr. 21). After petitioner and Reeder rejoined the contact, Reeder gave the contact the $2,600 (*ibid.*). Shortly thereafter, the contact's heroin runner appeared and gave Reeder two ounces of heroin (Tr. 21-22).

Later that evening, petitioner suggested that Reeder carry all the heroin, since there was no need for both of them to be carrying heroin; he stated that if the police approached, he would run and attempt to lead them away (Tr. 24). With Reeder in possession of the heroin, the two returned to the airport and flew back to Fayetteville, North Carolina (Tr. 24-25). Upon deplaning around

10:30 p.m., they were stopped by narcotics agents. Special Agent Walker of the North Carolina State Bureau of Investigation arrested petitioner and searched him pursuant to a warrant he had obtained that afternoon. The search was conducted in Reeder's presence in the office of the airport manager. Thereafter, Reeder was taken into an adjoining bathroom, informed of his rights, and told that the agents did not have a warrant to search him. He stated that he knew what they were looking for, reached into his pants, and brought out two plastic bags, each containing three small bags of heroin. The agents then conducted a further search and placed Reeder under arrest.

Reeder gave two statements to law enforcement officials—one on the date of his arrest and a lengthier statement about ten days later. The latter was given to Assistant District Attorney Ed Grannis in the presence of Reeder's attorney. The first statement dealt with the circumstances of the offense charged here. The subject of the second statement evidently was information that might be useful for a future prosecution for conspiracy to transport narcotics from New York to Fayetteville, North Carolina (Tr. 106). At trial, petitioner's counsel sought to introduce into evidence a short exchange between Grannis and Reeder's attorney at the outset of the second interview, in which Reeder's attorney expressed his understanding that any information given by Reeder during the interview would not be used in any criminal prosecution against him. See Tr. 105-107. Counsel for Reeder objected, and the court sustained the objection.[1]

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[1]The record does not disclose how it came about that the court entertained an objection from the witness's attorney. While this is an unusual situation, the court could have excluded the evidence on its own motion, and the matter has no bearing on the proper disposition of the issue.

1. There is no merit to petitioner's contention (Pet. 6-8) that he was denied the right to effective confrontation of the witness Reeder because counsel was not permitted to develop through cross-examination the self-serving motives for Reeder's testimony against petitioner.

The statement that the trial judge prevented petitioner's counsel from introducing during his cross-examination of Reeder did not show, as petitioner contends (Pet. 7), that Reeder had an "expectation of immunity from prosecution by the State, or other favorable treatment, in consideration for testimony against the petitioner * * *." It reflected only an agreement that, in whatever state prosecution that might be instituted, Reeder's own statements would not be used against him. Indeed, the paragraph in the statement immediately following that offered as evidence by petitioner's counsel contained the following colloquy between Reeder's attorney and the Assistant District Attorney (Gov't. Appendix on Appeal, p. 6):

> (LANE) [Reeder's attorney]. It is understood, of course, that the Assistant U.S. District Attorney has not made any promises with respect to the present case against him. He is making this interview with the full knowledge of a prior statement given by a Mr. Reeder.
>
> (GRANNIS) [Assistant District Attorney]. Yes, sir, o.k.

Thus, the statement sought to be introduced, when read in its entirety, had absolutely no bearing on Reeder's motive to testify or his alleged bias and was thus properly excluded by the trial judge.[2]

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[2]There was no question that the United States had not given immunity to Reeder. He pleaded guilty to the entire indictment, a fact which was brought before the jury (Tr. 11), and he testified that he had not been promised anything by the United States in return for his testimony (Tr. 29, 51).

Moreover, the record demonstrates that petitioner's counsel had ample opportunity to cross-examine Reeder regarding bias and motive. Counsel spent considerable time exposing a number of inaccuracies in the statement that Reeder had given authorities on the date of his arrest (Tr. 75-80). He fully explored the fact that Reeder had been summoned as a witness in the trial against Bobby Hill, Reeder's New York contact (although he did not testify in that trial). Counsel was permitted wide latitude during cross-examination to imply that Reeder had been a narcotics runner for Hill and had engaged in numerous narcotics transactions (Tr. 41-45). He questioned Reeder as to whether state charges were pending against him, the fact that he was arrested by state officers rather than federal officers, and whether he knew there was an indictment returned against him in state court (Tr. 42-43). That any kind of additional material would have added substantially to the impeachment of the witness's credibility by showing bias or motive to lie on the stand is highly speculative, and it is a virtual certainty, as we have shown, that the statement at issue here would not have served that purpose at all.

2. Petitioner also claims that the trial court erred when it failed to give the accomplice instruction that he requested.[3] The judge denied the requested instruc-

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[3]Petitioner's requested instruction read as follows (Pet. 6):

> The court instructs you that in passing upon the testimony of Howard Reeder you should scrutinize it closely, whether it is supported or unsupported, and you should only believe the same, if you do believe it, after careful and cautious consideration, and your consideration of his testimony should be in connection with the fact that he, Howard Reeder, is interested in the event, and with the further fact that he himself, upon his own admission is guilty as an accomplice of the crime as charged against the defendant, Alexander Williams.

tion because he believed he had covered it "generally and * * * adequately" (Tr. 234-235).[4]

The trial judge's decision whether or not to give a particular requested instruction is normally a matter within his discretion. See, *e.g., United States* v. *Nolte*, 440 F.2d 1124, 1126 (C.A. 5); *United States* v. *Becker*, 62 F.2d 1007, 1009 (C.A. 2). Moreover, it is settled that he is not required to accept the language employed by counsel in framing a requested instruction. See *Agnew* v. *United States*, 165 U.S. 36, 51-52; *Wheeler* v. *United States*, 165 F.2d 225, 228 (C.A.D.C.), certiorari denied, 333 U.S. 829. The question whether the trial judge erred by refusing to give a specific requested instruction regarding accomplice testimony must be determined by weighing that refusal against the other circumstances of the case, such as the extent of corroboration of the challenged testimony and the adequacy of the general instruction on credibility. See, *e.g., Jordan* v. *United States*, 345 F.2d 302 (C.A. 10); *Hardy* v. *United States*, 343 F.2d 233 (C.A.D.C.).

Under the facts of the present case, it is clear that there was no prejudice to petitioner's rights from the judge's refusal to give the requested instruction. There was ample testimony before the jury regarding the possible bias or

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[4]The judge instructed the jury (Tr. 225-226) that it "should carefully scrutinize the * * * circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief [and] * * * [c]onsider each witness' * * * motive * * * and also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which if at all each witness is either supported or contradicted by other evidence. * * * [A] witness may be discredited or impeached by contradictory evidence or by evidence that the witness has been convicted or admits the commission of a felony."

improper motive of Reeder, as well as his role as an accomplice; his guilty plea and his interviews with the state and local law enforcement authorities were fully explored. Moreover, the judge's instructions to the jury effectively covered credibility and motive and differed only slightly from the substance of so much of petitioner's requested instruction as permissibly suggested to the jury that an accomplice's testimony should be received with caution and scrutinized with care. However, the specific instruction requested by petitioner (see n. 3, *supra*) was not a balanced cautionary instruction regarding accomplice testimony in general but was instead a comment on the credibility of a particular government witness—a comment with which the trial judge apparently did not agree. Accordingly, he was not required to give the instruction as proposed.

Finally, the evidence against petitioner was not simply uncorroborated testimony of Reeder, but it included the seized narcotics, the airline tickets to New York, and petitioner's comings and goings to the airport with Reeder. Under these circumstances, no further accomplice instruction was required.

Nor is there a conflict among the circuits. Differing decisions derive from a largely factual distinction between cases in which accomplice (or paid informer) testimony has been corroborated by other evidence and those in which it has stood as the sole or dominant source of incrimination, in which the status of the witness as an accomplice has been obscured from the jury, or in which the substance of instructions regarding accomplice testimony has not been substantially covered in other instructions. See *McMillen* v. *United States*, 386 F.2d 29, 36 (C.A. 1); *United States* v. *Busby*, 484 F.2d 994, 996 (C.A. 9). Here, the accomplice testimony was corroborated and was not the sole or dominant source of incrimination, the status of Reeder as an accomplice was not

obscured from the jury, and the substance of petitioner's requested instruction was covered in the main charge. In such circumstances, no circuit has held the failure to give a cautionary instruction on accomplice testimony reversible error.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[5]There is no conflict between the decision of the court of appeals in this case and the decisions relied upon by petitioner, *Dunn* v. *United States*, 318 F.2d 89 (C.A. 5), and *United States* v. *Davis*, 439 F.2d 1105 (C.A. 9).

In *Dunn*, the Fifth Circuit reaffirmed two of its earlier decisions—*Joseph* v. *United States*, 286 F.2d 468, 469, and *Phelps* v. *United States*, 252 F.2d 49, 53—in which it had held that the failure to give a specific cautionary instruction on accomplice testimony "is often not reversible error," noting that whether there is reversible error "depends on the circumstance of each case and the conduct of the trial as a whole" (318 F.2d at 93). The particular circumstances in *Dunn* made the failure to give a cautionary instruction reversible error: the entire case rested on the uncorroborated testimony of an accomplice, and the jury, before returning a verdict, had reported that it was hopelessly deadlocked.

Nor is *United States* v. *Davis*, *supra*, in direct conflict with the court of appeals' decision here, for the court in *Davis* held only (439 F.2d at 1107):

> * * * [W]here, as in this case, the instruction is requested and where the guilt of the defendant rests almost entirely upon the testimony of an accomplice and where, as here, such accomplice has given contradictory stories in an apparent attempt to inculpate a defendant, the failure of a court to give a cautionary instruction is error, prejudicial to the appellant and justifies a reversal of his conviction. [Footnote omitted.]

Here, of course, Reeder had not given "contradictory stories in an apparent attempt to inculpate" petitioner, but had consistently given the same account of the events in question. Nor did petitioner's conviction rest entirely on Reeder's testimony.